

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

1. STATE OF OKLAHOMA, ex rel. )  
W.A. DREW EDMONDSON, in his capacity as )  
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OKLAHOMA and OKLAHOMA SECRETARY )  
OF THE ENVIRONMENT C. MILES TOLBERT, )  
in his capacity as the TRUSTEE FOR )  
NATURAL RESOURCES FOR THE )  
STATE OF OKLAHOMA, )

Plaintiffs, )

v. )

05-CV-0329 TCK-SAJ

1. TYSON FOODS, INC., )  
2. TYSON POULTRY, INC., )  
3. TYSON CHICKEN, INC., )  
4. COBB-VANTRESS, INC., )  
5. AVIAGEN, INC., )  
6. CAL-MAINE FOODS, INC., )  
7. CAL-MAINE FARMS, INC., )  
8. CARGILL, INC., )  
9. CARGILL TURKEY PRODUCTION, LLC, )  
10. GEORGE'S, INC., )  
11. GEORGE'S FARMS, INC., )  
12. PETERSON FARMS, INC., )  
13. SIMMONS FOODS, INC., and )  
14. WILLOW BROOK FOODS, INC., )

Defendants. )

**DEFENDANTS JOINT RESPONSE TO STATE OF OKLAHOMA'S  
MOTION FOR ORDER IMPLEMENTING AND ENFORCING RULES FOR  
DISCOVERY OF ELECTRONICALLY STORED INFORMATION  
AND MEMORANDUM IN SUPPORT THEREOF**

Plaintiff the State of Oklahoma has filed a precipitous motion seeking an Order  
“implementing and enforcing the rules for discovery of electronically stored information.” Pl.  
motion at 1. Given the early stages of the parties’ discussions concerning electronic discovery,

Plaintiff's motion is premature, likely unnecessary, and somewhat puzzling. Moreover, to the extent any action by the Court is appropriate, the relief Plaintiff seeks is vague and its "proposed order" is unhelpful. To the extent the Court concludes that an Order would provide a helpful incentive for the parties to move forward on the issue of electronic discovery, Defendants urges much more definitive and much more specific guidance from the Court. To that end, Defendants have submitted their own Proposed Order submitted with this response. See Exhibit 1.

### **BACKGROUND**

As Plaintiff's motion notes, representatives of the parties have thus far met on only two occasions to discuss issues concerning electronic discovery. As is evident from plaintiffs' own submissions, the issues involved in electronic discovery are numerous, extensive, and complex, and the parties have not yet reached a final agreement on those issues. The parties have, however, made progress toward agreement on a number of issues, and Defendants at least expected that such discussions would continue to an agreement, an impasse, or (most likely) a partial agreement concerning both Plaintiff's and Defendants' obligations concerning electronic discovery. Indeed, at the time Plaintiff made its motion, the parties had not yet even exchanged their proposed stipulated orders for mutual comment and revision.

Defendants will not belabor here all of the specific issues the parties have discussed or what progress has been made to date as to each of them. Such a discussion would not be helpful to the Court in the present context and would only invite dispute among the parties as to who said what when. Suffice it to say that Plaintiff's apparent attempt to imply that the parties' discussions have reached a dead end is simply mistaken. Defendants have remained and still remain ready and willing to continue discussions with Plaintiff concerning the wide variety of

topics involved in electronic discovery, and were surprised that Plaintiff's motion apparently assumes otherwise.

In sum, Plaintiff's present motion asks the Court to mandate discussions among the parties that are already going on and making progress, yet does not make clear precisely why the Court's intervention is necessary at this time.

### **SCOPE OF ELECTRONIC DISCOVERY ISSUES**

As Plaintiff's motion notes, the electronic exchange and storage of information has mushroomed dramatically over the past decade. As a result, attorneys and courts are facing a number of new issues concerning the discovery of such information, many of which they have never before addressed. Indeed, the Court need only look at Plaintiff's list of topics or Defendants' Proposed Order to see examples of the number and variety of different questions with which the parties will need to deal.

The complexity of the issues in this particular case is magnified by the nature and sophistication of the parties. For example, the Plaintiff State of Oklahoma has a number of individual agencies that have information relevant to the subject matter of this case, and many of those agencies employ different, incompatible, and even unique systems for electronic mail and information storage. Moreover, each individual agency may have multiple systems for different kinds of data, or successive systems over time for the same type of data. At least to some extent, discovery issues concerning each of these individual electronic systems will need to be addressed separately. Many of the Defendants may also have multiple systems for electronic mail and storage that will require similar individual attention.

Discussion and resolution of the methods for searching, accessing, and copying information from all these sources will unavoidably require a party-by-party, agency-by-agency,

or even system-by-system examination. Although the parties can certainly agree on some issues on a broad basis, Plaintiff will unquestionably need to sit down with each individual Defendant and discuss the specific character and quirks of that Defendant's system(s). Likewise, Defendants will need to address the individual characteristics and features of the electronic storage system(s) of each of the state agencies that may have relevant information.

In Defendants' view, the parties should not burden the Court with the complexity and minutiae of these issues until and unless becomes clear that the parties cannot reach a voluntary agreement. Even then, the parties should submit only the narrowest of disputes for the Court's resolution, clearly identifying all issues on which agreement has been reached. This is the approach reflected in Defendants' Proposed Order.

#### **THE NEW ELECTRONIC DISCOVERY RULES**

Plaintiff's motion tries to make an issue of the impending amendments to Federal Rules 26, 33, and 34 involving electronic discovery. Under the present circumstances, the issue of whether the Court should "implement" those amendments early is effectively moot. First, as a practical matter, the December 1, 2006 effective date of the amendments (assuming no congressional veto) is so close as to be effectively here already. By the time Plaintiff schedules this motion for hearing, the parties argue it, and the Court issues its decision, December 1 will likely already have come and gone. Moreover, even if the Court were to hear and decide the motion before December 1, the number of parties and attorneys involved make it unlikely that the meetings required under the amended rule 26 could take place before that date in any event. In a nutshell, Plaintiff's request that the Court accelerate these new discovery rules, brought barely two months before the amendments' formal implementation, can serve no useful purpose in advancing this litigation.

In addition, the issue of the amendments to the rules is moot because Defendants are already ready and willing to have exactly the discussions contemplated under the proposed amended Rule 26. Indeed, as discussed above, those discussions are already well underway, and Defendants' aware of no reason that they cannot and should not continue even before December 1. The Court has no need to accelerate the implementation of the rules merely to promote discussions that are already going forward.

### **DEFENDANTS' PROPOSED ORDER**

As noted above, Defendants believe that Plaintiff's motion is premature and unnecessary because the parties are already engaged in the discussions concerning electronic discovery that Plaintiff wants the Courts to order. Nevertheless, should the Court conclude that this case would benefit from promoting such discussions, Defendants urge the Court to take a much more direct and definitive hand than that contemplated by Plaintiff. Plaintiff included with its motion what it called a "Proposed Order," which is not an order at all but simply a list of items for discussion. Defendants have submitted their own Proposed Order, including most of those discussion topics, but also setting specific deadlines for meetings and for a report back to the Court.

Defendants's Proposed Order would require the parties to meet and confer, either individually or collectively, and to submit to the Court by January 15, 2007 one or more proposed stipulated orders concerning the parties' mutual obligations for electronic discovery, including any agreed additional interrogatories or depositions necessary to address such issues. To the extent the parties cannot agree on a particular term, the order would require that the parties submit alternative terms for the Court's consideration. The order would also permit the parties to brief their respective positions on these alternatives.

To the extent the Court believes the parties require further direction on this issue at this time, Defendants believe that their more explicit Proposed Order, setting specific deadlines, would be more helpful in advancing the litigation than Plaintiff's rather vague submission. Thus, should the Court elect to take action, Defendants urge it to adopt the Proposed Order submitted in conjunction with this response.

### **NEED FOR ENTRY OF CASE MANAGEMENT ORDER**

Although entry of Defendants' Proposed Order on electronic discovery will resolve Plaintiff's instant motion, Defendants note that Plaintiff's motion is one of a series of discovery disputes that have recently come before the Court. Although more than 18 months have passed since the filing of the First Amended Complaint, the parties are operating without an umbrella scheduling order or case management order, and defendants are having difficulty obtaining the information in Plaintiff's possession that underlies Plaintiff's claims and the related defenses. Defendants believe that prompt and orderly production of this information may assist the Court in narrowing the claims in this case and in lessening the related burdens on the parties and the Court.

To that end, Defendants filed on 10/17/06 a *Motion for Entry of Case Management Order and Integrated Brief in Support* (Docket No. 946). In addition to its other benefits, Defendants believe that entry of the proposed Case Management Order may reduce the number of instances in which the parties invoke the Court's supervision to resolve discovery disputes like the one here.

### **CONCLUSIONS**

For the reasons discussed above, Defendants urge this Court to direct the parties to address the issues of electronic discovery as set forth in Defendants' proposed order.

Dated: October 20, 2006

Respectfully submitted,

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### **CERTIFICATE OF SERVICE**

I certify that on the 20th day of October, 2006, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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I also hereby certify that I served the attached documents by United States Postal Service, proper postage paid, on the following who are not registered participants of the ECF System:

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